In The

Supreme Court of Virginia

RECORD NO. 121534

PKO VENTURES, LLC,

Appellant,

v.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY,

Appellee.

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

In 2007, the General Assembly passed an anti-*Kelo* statute, forbidding condemnations that would facilitate economic development. That act took effect in July 2007, but it contained a provision allowing housing authorities to continue to acquire properties until July 2010.

An authority in Norfolk waited until just before the 2010 acquisition deadline to begin this condemnation suit. It did not acquire the subject property until August 2012, long after the deadline had expired.

In this appeal, the Court is called upon to embrace the strong public policy behind the statute, and to apply the act exactly as it is written.

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STATEMENT OF THE CASE

This appeal arises from an eminent-domain proceeding in the Norfolk Circuit Court. The Norfolk Redevelopment and Housing Authority filed a petition in April 2010 to condemn land owned by PKO Ventures, LLC. The purpose of the acquisition was to assemble the land with adjacent properties and convey it to a private developer.

The landowner subsequently moved to invalidate the condemnation, since the Authority did not acquire the property before the statutory deadline of July 1, 2010. Code §1-219.1; 2007 Acts ch. 882, 901, 926, cl. 3. That act creates two sunset provisions for certain condemnations. The provision in clause 3 requires that property be *acquired* before the July 2010 deadline. The provision in clause 4 permits the *filing* of acquisition proceedings by that date, with no deadline for the ultimate acquisition. Clause 3 applies to this proceeding; clause 4 does not.

The landowner also challenged the premise that the property was in a blighted area, and asserted that the

Authority's biased finding of blight denied the landowner due process of law.

The trial court consolidated this case with four others involving similarly situated properties. It ruled that the Authority was not barred from taking the property despite the 2010 deadline, and struck the landowner's challenges based on the blight finding and the Due Process Clause.

The cases were then deconsolidated for separate just-compensation trials. The court conducted such a trial here, and entered a final order confirming the condemnation jury's award. This Court awarded the landowner an appeal on February 19, 2013.

ASSIGNMENTS OF ERROR

1. The trial court erroneously refused to bar the Authority from acquiring the subject property after July 1, 2010. (Preserved at A. 235-41.)

2. The trial court erroneously ruled that the subject property was in a blighted area. (Preserved at A. 250-55.)

3. The trial court erroneously struck the landowner's due process objection, because the Authority had a financial interest in its finding that the area was blighted. (Preserved at A. 242-48.)

4. The trial court erroneously applied the doctrine of *stare decisis* in finding that the Authority was permitted to make a finding of blight. (Preserved at A. 242-48.)

FACTS

The subject real property is located near Old Dominion University in Norfolk. The university conceived a plan to develop an area adjacent to the campus for several non-educational uses, including a retail shopping center.

Since the school did not possess the power of eminent domain for private development, it arranged with the Authority in the late 1990's to acquire the land it wanted for this construction. In order to facilitate the acquisition of this and the related parcels, the Authority agreed to create a redevelopment plan for the specific area desired by the university. The school agreed to pay the Authority a 4% commission on all sums paid to acquire the land. A. 263.

But use of the power of eminent domain required a finding that the area was blighted. The Authority thus undertook a study of a pre-defined geographical region – specifically, the area that the university wanted – to determine whether it was blighted. After a cursory examination of the area by an Authority employee, the Authority ruled that blight existed in the exact area desired by the university. Then, as promised, it prepared a redevelopment plan and began condemning property in phases. The Authority has received over $400,000 in commissions as a result of this project. A. 268.

The Authority filed the petition for condemnation in this case several years later, in April 2010. The subject property is a ten-unit residential apartment building. It was, as of the date of trial, fully occupied by ten families, and remained so as of the date of filing of the petition for appeal. While this appeal was pending, the Authority evicted all ten families; the building is now vacant.

ARGUMENT

I. State law prohibits this condemnation proceeding. (Assignment 1)

Standard of Review

This Court reviews de novo a trial court's interpretation of legislation. *Laws v. McIlroy*, 283 Va. 594, 598 (2012).

Discussion

In 2005, the Supreme Court of the United States ruled in *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005), that condemnation for the purpose of economic development was not forbidden by the federal Constitution. This decision quickly generated significant backlash, both in scholarly journals and in public opinion. Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 Va.L.Rev. 1091, 1097 n. 22 (2008).

Virginia's legislators, sensitive to these widely held views, soon acted to ensure that *Kelo* could not come to the Old Dominion. In 2007, the General Assembly enacted Code

§1-219.1, which prohibits the use of eminent domain for purposes of economic development. It explicitly forbids condemnation for blight removal unless the specific property is blighted. Code §1-219.1(A)(v).

The act that resulted in §1-219.1 contains two sunset provisions, one of which is relevant here. Clause 3 of the act, the one that governs here, provides in pertinent part:

> That, until July 1, 2010, the provisions of this act shall not affect the ability of a redevelopment and housing authority to acquire property pursuant to any redevelopment or conservation plan adopted prior to January 1, 2007 . . .[1]

The primary issue in this appeal is whether the Authority acquired this property before the July 2010 deadline. If it did, then §1-219.1 does not bar this proceeding. But if the Authority did not acquire the property before the deadline,

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[1] 2007 Va. Acts ch. 882, 901, 926. Clause 4 creates a separate extension in favor of the Authority and the City of Norfolk to acquire different properties for the construction of a recreational facility. That extension, which is not implicated in this appeal, allows for acquisitions to be *instituted* before July 1, 2010.

this Court must reverse the judgment below and dismiss this eminent-domain proceeding.

There is no dispute that if this statute applies to this condemnation, this proceeding is prohibited; the parties stipulated that the subject property is not blighted. A. 228.

A. How property is acquired in eminent-domain proceedings

In Virginia, property may be condemned in one of two ways. The first, known as a "quick-take," involves the filing and recordation of a certificate of take and the deposit of funds by the condemnor. In such cases, title to the condemned property passes immediately to the condemnor. Code §25.1-308(A)(1) and (2). The condemnor may enter the property and take possession of it upon recordation of the certificate. Code §25.1-304. While the title thus acquired is defeasible, Code §25.1-308(B), the condemnor nevertheless acquires the property instantly.

The second method, known as "slow-take," requires the filing of a petition in condemnation by the condemnor, the

adjudication of any defenses asserted by the landowner, a just-compensation trial, the filing and adjudication of exceptions to the jury's report, and entry of a final order confirming or modifying the report. If the condemnor pays the amount of the just-compensation award into court, title passes from the landowner to the condemnor. Code §25.1-237. Even after entry of a final order, a condemnor may dismiss the proceedings and decline to acquire the property. Code §25.1-249 (permitting voluntary dismissal of proceeding until 30 days after date of final order).

In this case, the Authority employed slow-take procedures, because it was not authorized to effectuate a quick take. Code §36-27. It filed a condemnation petition in April 2010, but it did not acquire the property until it paid the just-compensation award on August 10, 2012, more than two years after the acquisition deadline fixed by the General Assembly.

B. Effect of the expiration of the deadline

Under clause 3 of the act, "until July 1, 2010, the provisions of [§1-219.1] shall not affect the ability of a redevelopment and housing authority . . . to acquire property pursuant to any redevelopment or conservation plan . . .." The necessary corollary to this provision is that after the deadline, the Authority may no longer acquire property by condemnation for a forbidden purpose.

The trial court avoided this analysis by claiming that it was applying the law that was in effect as of the date of filing of the petition in condemnation. A. 443-44. Ignoring the fact that the deadline had been "in effect" since 2007, the court effectively rewrote clause 3, so that it would permit the Authority to *institute* proceedings before the deadline, but actually *acquire* the property after the deadline passed.

This, of course, courts may not do. *Anderson v. Commonwealth*, 182 Va. 560, 566 (1944) ("Courts are not permitted to rewrite statutes."). If the legislature wished to

establish a *filing* deadline for condemnation cases, it could have done so. Indeed, clause 4, which applies to a different project, does just that (". . . provided such acquisitions are instituted prior to July 1, 2010."). But clause 3 – the one relevant to this appeal – required the Authority to *acquire the property* before July 1, 2010.

In drafting clauses 3 and 4, the legislature differentiated between acquiring property and instituting acquisitions. "When the General Assembly uses two different terms in the same act, those terms are presumed to have distinct and different meanings." *Indus. Dev. Auth. v. Montgomery County*, 263 Va. 349, 353 (2002); *Cuccinelli v. Univ. of Virginia*, 283 Va. 420, 429 (2012) (citing *Montgomery County*).

By holding that clause 3 did not bar an acquisition after the deadline, so long as it was instituted before the deadline, the trial court merged these two distinct phrases into a single meaning. This holding was manifest legal error.

C. Remedy

Since the deadline passed before the Authority acquired the parcel, this property may not be taken for blight removal, because the parties agree that this apartment building is not blighted. A. 228, ¶1. As such, the proper remedy is to reverse this judgment and dismiss this condemnation proceeding. If the Court takes this action, it will be unnecessary for it to evaluate Assignments 2-4.

II. The finding of blight in the redevelopment area was not supported by the evidence. (Assignment 2)

Standard of Review

This assignment challenges a mixed question of law and fact – whether the conditions documented in the relevant area met the definition of a blighted area under Virginia law. The Court reviews such issues de novo. *John Crane, Inc. v. Hardick*, 283 Va. 358, 367 (2012).

Discussion

The Code of Virginia defines blight (Code §36-49) and authorizes condemnation to eradicate it. But this Court has always construed this power very narrowly. For example, in *Bristol Redevelopment and Housing Auth. v. Denton*, 198 Va. 171 (1956), the Court ruled that the Bristol authority could not condemn under a redevelopment plan where only 39% of the area to be acquired met the definition of blight. *Id*. at 180. In reaching this conclusion, the Court emphasized that a finding of blight can be predicated only upon conditions that are "detrimental to the safety, health, morals or welfare to the community." *Id*. at 177.

In this case, the trial court's approval of blight-based condemnation suffers from two fatal flaws. First, the 1998 redevelopment plan itself identifies only 20% of the structures in the redevelopment area as being in poor condition (A. 310), a figure vastly lower than the percentage that this Court found wanting in *Bristol RHA*. Instead of focusing on the mandatory factors of community safety,

health, morals, and welfare, the study cited things like incompatible land uses (*e.g.*, a tavern next to a church), public infrastructure shortcomings, and demographic changes.

These factors may be relevant in other contexts, but they are immaterial to blight analysis. A trial court may not base a finding of blight upon factors such as population changes, as the redevelopment plan did here.

The second fatal flaw arises from the condition of the relevant area in 2010, when the Authority filed this condemnation petition. Regardless of the state of affairs twelve years earlier, by the time this case began, the redevelopment area was not blighted.

The Authority has never contended that the landowner's apartment building was itself blighted. It argued instead that the condition of the area in 2010 was irrelevant, and the trial court agreed. A. 399; A. 440-41. But this Court has ruled, in a case involving parallel provisions of a conservation plan, that the state of the

property at the time suit is filed "must be considered when determining whether the original purpose of the acquisition remains viable at the time the condemnation occurs." *Norfolk RHA v. C and C Real Estate, Inc.*, 272 Va. 2, 11 (2006). If blight no longer existed in the area in 2010, then blight eradication was not a legitimate public purpose for condemning private property.

III. The finding of blight was not made by a neutral decisionmaker. (Assignments 3 and 4)

Standard of Review

The question of whether the Authority had an impermissible financial interest in a finding of blight is a mixed question of law and fact, which is reviewed de novo, as with Assignment 2. The application of *stare decisis* is an issue of law, and is renewed de novo, as with Assignment 1.

Discussion

After the Authority made a finding of blight in the area of the landowner's property, the trial court reviewed that

finding in an evidentiary hearing. That review was not de novo; the court afforded substantial deference to the finding, requiring the landowner to rebut it by "clear and convincing proof." *NRHA v. Arney*, No. 08-1918 (Norfolk Cir. Ct. 2009) letter opinion (July 23, 2009) at 17, adopted here at A. 440-41.

But the landowner's objection went to more than the mere finding of blight; it also contended that the Authority was a biased decisionmaker because it was entitled to receive 4% of all sums paid by the university's foundation for all properties acquired under the plan. The Authority thus had a direct and obvious pecuniary interest in finding blight: if it did find blight, it would receive a lucrative commission; if it did not find blight, it would receive nothing. The Authority found blight, and eventually received over $400,000 as a direct result of that finding.

In its opinion letter, the trial court did not evaluate the merits of the bias claim. Instead, it found that a different landowner had previously raised the same argument in other

litigation, and had lost. A. 440-41, referring to *NRHA v. Arney*, *supra*. The trial court held that the doctrine of *stare decisis* foreclosed the landowner's argument here.

A. *Stare decisis* does not apply, and does not bind this Court.

The trial court erroneously denied the landowner a full opportunity to litigate the issue of the Authority's biased position as an arbiter of blight. *Stare decisis* applies to governing principles of law, not to findings of fact.

In refusing to consider the landowner's argument, the trial court noted that a similar position had been taken by other landowners within the area of this redevelopment plan. The trial court had ruled in favor of the Authority in two cases, and in one of those, this Court refused a petition for appeal. *Arney v. NRHA*, Record No. 100940.

"[T]he refusal of a petition for appeal carries no precedential value, except as to the issues addressed within 'the four corners of the Court's order.'" *Asplundh Tree Expert Co. v. Pacific Employers Ins. Co.*, 269 Va. 399, 406 n.

7 (2005). Plainly, *this* Court is free to examine the merits of this issue, since it has never adjudicated them.

The trial court mistakenly held that this issue could not be litigated below. Unless the evidence and arguments in the two cases are identical, the court could evaluate whether, for example, the landowner here could establish a key factor that the landowner in *Arney* did not. Similarly, the landowner was free to raise arguments that the landowner in *Arney* did not; indeed, the landowner here did just that, in the form of its due-process challenge. See A. 439-40. The trial court brushed this contention aside because it had previously (in *Arney*) ruled that the Authority's acceptance of sales commissions was permissible. A. 440-41. As such, it wrongly refused to consider the landowner's constitutional arguments, made for the first time here.

B. <u>A biased decisionmaker does not afford due process</u>.

In making its original finding of blight – the one to which the trial court afforded significant deference – the

Authority performed a quasi-judicial function, since it exercised "inquiry, investigation, comparison, deliberation, and decision." *Taylor v. Arlington County*, 189 Va. 472, 483 (1949). In any such evaluation, an unbiased decisionmaker is essential to due process of law. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955) ("no man is permitted to try cases where he has an interest in the outcome.").

In this instance, the Authority was called upon to make a finding whether a pre-defined area was blighted or not. It stood to receive a generous commission if it found blight, but it would receive nothing if it found no blight.

Unsurprisingly, the courts have been swift to condemn arrangements whereby public decisionmakers may profit by ruling in a certain way. For example, in *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444 (1927), the Supreme Court of the United States reversed a conviction where the original decision on guilt or innocence was made by a town's mayor; pursuant to the applicable ordinance, the mayor was entitled to collect a sum from every fine assessed for

convictions. The same result obtains when the financial incentive runs to an institution instead of directly to a person. *See* *Ward v. Village of Monroeville*, 409 U.S. 57, 59, 93 S.Ct. 80, 82-83 (1972) (mayor adjudicated guilt; fines provided substantial portion of village's funds).

The requirement of impartiality applies in both civil and criminal proceedings, and "has been jealously guarded" by the Supreme Court. *Marshall v. Jerrico*, 446 U.S. 238, 242, 100 S.Ct. 1610, 1613 (1980).

The Authority had a direct pecuniary interest in reaching a particular decision on the question of whether blight existed here. This interest simply cannot be reconciled with the Due Process Clause.

CONCLUSION

The taking of this private property was plainly prohibited by statute. The trial court ignored the 2010 deadline by claiming to apply "former law before a new Code provision takes effect." A. 442. But the relevant statute

took effect in 2007, three years before this proceeding was filed. The legislature prescribed a deadline for acquiring property, and the trial court simply erased it.

This Court should reverse the judgment below and dismiss this condemnation proceeding, based on the passage of the deadline in Code §1-219.1. In the alternative, the Court should reverse and enter final judgment for the landowner, based on Assignments 2-4. The Court should direct the trial court to award the landowner its attorney's fees and costs, in this Court and below, under Code §25.1-419.

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CERTIFICATE

I hereby certify that on this 8th day of March, 2013, pursuant to Rules 5:26(h) and 5:32(a)(3)(ii), fifteen paper copies of the foregoing Brief of Appellant and ten paper copies of the Appendix, along with 10 copies on CD-Rom, have been hand-filed with the Clerk of the Supreme Court of Virginia. Three paper copies of the Brief and one paper copy of the Appendix, along with one copy on CD-Rom, have been served, via UPS Ground, upon:

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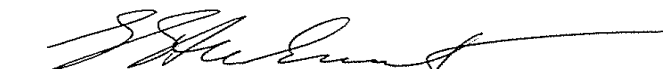

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